Supreme Court, U.S.
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Docket No. _____

SUPREME COURT OF THE UNITED STATES

CLAUS PETER SPETH, Petitioner,

versus

THE STATE OF NEW JERSEY, Respondent.

On petition for a writ of certiorari to the Superior Court of New Jersey, Appellate Division, to review its decision at Docket No. A-5655-00T1

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI

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April 22, 2003.

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APPELLATE DIVISION INTERLOCUTORY OPINION AFFIRMING CONVICTION
(July 14, 1999)

This appeal requires us to determine: a) whether a prosecution for tampering with a witness, N.J.S.A. 2C:28-5a, requires the State to distinguish between tampering with physical evidence or testimony; and b) whether the trial judge committed plain error by failing to include in the jury charge a definition of "knowingly" as "being aware that it is practically certain that defendant's conduct will cause the forbidden result," and "purposely" as taking a "substantial step which is strongly corroborative of the actor's criminal purpose." We answer both questions in the negative and affirm the conviction.

Defendant Claus P. Speth appeals from a conviction for third-degree tampering with a witness, N.J.S.A. 2C:28-5a. Two additional charges--fourth degree tampering with physical evidence, N.J.S.A. 2C:28-6, and fourth degree false swearing, N.J.S.A. 2C:28-2,--resulted in a deadlocked jury. These charges remain outstanding. [FN1] The trial judge sentenced defendant to two years probation and a fine of $125, and a post-judgment motion challenging the verdict was denied. [FN2]

The facts described at trial are complicated and require extensive exposition. On August 13, 1993, Ronald Puttorak, forty-three years old, was arrested for sexual assault and placed in protective custody in the Essex County Jail. Approximately six hours after the commencement of his incarceration, his lifeless body was found hanging from a cell door. When Geetha A. Natarajan, M.D., an assistant medical examiner, arrived at the

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1. Defendant appealed the conviction, but because these charges are still pending, and their retrial awaits the outcome of this appeal, this appeal is interlocutory. Nevertheless, in the interests of justice, we grant leave to appeal, nunc pro tunc, and will decide the issues raised herein.

2. Other issues were raised by additional motions including a "gag order" entered by the trial judge. That issue is the subject of other proceedings and is not addressed on this appeal.

scene, the body had been cut down. After requesting a demonstration of how the body was found, Natarajan received an explanation, which she later related:

> According to the correction officer, he was found with his back against the door, against the railings, the metal railings
>
> of the door, and he had tied the sheet, he had twisted the white sheet into "a ligature."
>
> [He h]ad tied it on one of the rails of the door on one of these cross bars and tied it around his neck and his slide [sic] forward because if he had stood up it will [sic] not cause compression because he's tall and this [sic] cross bars are not that high because of the door of the cell.
>
> So what he did is, in order to compress the neck, in order to hang, he had to slid [sic] his body forward into the cell in the position in which ... you can see the correction officer there by causing compression to the neck by the application of that sheet and sliding forward.

At the medical examiner's office, Natarajan assigned the Puttorak case to Marie Jose Macajoux, M.D., a New York City medical examiner, who was also working part-time as a forensic pathologist at the New Jersey Office of the State Medical Examiner. After conducting an autopsy and further examinations, Macajoux and Natarajan confirmed that Puttorak's death was a suicide and that the hyoid bone, a bone located in the neck area which would prove critical to this prosecution, did not reveal a fracture. In sum, the hyoid bone was "unremarkable."

In October 1993, an attorney representing the Puttorak family contacted the Essex County Prosecutor requesting to see the prosecutor's file, as well as the State medical examiner's file, with respect to Puttorak's death. At the family's request, defendant examined some evidence at the medical examiner's office.

Defendant, accompanied by a Mr. Harmatz, who defendant identified as a criminologist, and Jeanette Aguilar, a technician in the medical examiner's office, opened the evidence bag and removed Puttorak's organs, which had been preserved in formaldehyde. No one other than defendant handled the neck while in the room, and, except for a brief period when she left to ask for permission for defendant to photograph the exhibit, Aguilar remained in the room with defendant.

Defendant took out the neck last, put it on the counter and photographed it. Six photographs were taken just after he removed the neck from the bag but before he examined it. Aguilar later was shown photographs taken while defendant had examined the neck. Although she was unable to determine whether the neck depicted in the photographs was the Puttorak neck, Aguilar was able to say that the photographs did not depict what she saw later when Natarajan showed her the specimen, specifically a broken hyoid bone.

Aguilar testified that defendant then took the neck "in his hand and examine[d] it by taking his thumbnail and rubbing it and scraping off the tissue on the bone." The tissue that defendant had pushed away with his thumbnail was in the area of the hyoid bone, but Aguilar did not see or hear defendant break or snap the bone.

As defendant used his thumbnail to either scrape or pick at the tissue on the bone, he asked Harmatz to take photographs while he held the neck at different angles. Aguilar estimated that forty photographs were taken. While this transpired, defendant told Harmatz that " 'she messed [sic] a fracture.' "

According to Aguilar, defendant said the fracture was on the right side of the hyoid bone. Although Aguilar was standing next to defendant at the time, she did not see the fracture, and defendant did not show it to her. Defendant also said that there was a hemorrhage on the right side. Aguilar did not observe the hemorrhage either.

After defendant had concluded his examination, he returned all the organs to the bag. Aguilar secured the organs, returned the key to her

supervisor, Lombardi, and told him that defendant said he found a fracture and hemorrhage on the right side that had been missed.

Aguilar reported the episode with defendant to Natarajan. Natarajan examined the specimen in Lombardi's and Aguilar's presence. She observed that the specimen was different from when the autopsy was conducted insofar as "there was a clearly recognizable fracture of the hyoid bone on the left side" and the "surrounding area of the fracture was devoid of any tissue." Natarajan continued: "The periosteum, which is the membrane that covers over [the hyoid bone], appeared to have been partly scraped, and there was absolutely no hemorrhage in any of the tissue that is adjacent to the fracture area." Both Aguilar and Lombardi observed the hyoid bone fracture but no hemorrhage.

Despite Natarajan's trial testimony about the location of the fracture on the left side of the hyoid bone, she explained that at the time she first examined the bone, she was holding the bone backwards and, as a result, had mistakenly believed the fracture was on the right side, which is the side that defendant said was fractured and had hemorrhage.

After Natarajan had completed the examination of Puttorak's neck, she wrote a memorandum to Robert Goode, M.D., also an assistant state medical examiner at the time, in which she described the fracture to the hyoid bone as "clearly fresh and artifactual." She defined an artifact as something that "had no real effect to the cause of death because it ... looked like it was fractured after death, or after the specimen was fixed." Natarajan also wrote that she saw no evidence of hemorrhage surrounding the fracture, identifying the fracture's location as the "right greater cornu."

The next day, Goode examined the Puttorak neck. Like Natarajan, Goode found a bloodless fracture on the left side of the hyoid bone, as well as two bloodless fractures of the thyroid cartilage. However, as did Natarajan, Goode initially mistakenly believed the hyoid fracture to have

been on the right side. [FN3] The fracture was not of the type that could be missed by an experienced forensic pathologist.

Goode asked five other pathologists, including Macajoux, to look at the neck and tell him what they saw. At trial, four pathologists testified that they saw a post-mortem fracture of the hyoid bone with no hemorrhage. Goode informed Macajoux that defendant had observed a fracture of the right hyoid bone and that there was hemorrhage. Macajoux saw an "obvious fracture of the hyoid bone." The fracture was not displaced but was "like a hinge fracture." It was located "[s]omeplace between the greater horns and the body of the hyoid bone." She could not remember at the time of trial whether the fracture was on the right or left side. Macajoux saw no hemorrhage.

Goode reported the apparent post-mortem fracture to the Attorney General's office. Clearly, he suspected that the integrity of the specimen had been compromised. Finally, in November, 1993, the Prosecutor's Office ceased cooperating with the Puttorak family attorney.

On January 7, 1994, a certification signed by defendant was submitted in a civil action captioned Estate of Ronald Puttorak v. Essex County Prosecutor's Office. In the certification, defendant stated that he had found a "significant fracture of the hyoid bone ... associated with abundant hemorrhage," which, according to the certification, meant that "the fracture must have occurred while Mr. Puttorak was still alive." The certification further stated that "[t]his type of fracture may occasionally occur in this type of hanging but may also occur in association with other types of violence to the neck."

On April 5, 1994, defendant telephoned Michael Baden, a medical examiner whom defendant had known since the late 1960's, and told Baden

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3. As it turned out, the state medical examiner pathologists had originally identified the hyoid bone fracture that they could see as having been on the right side when, in fact, it was on the left side. It was not until April 1994 that they realized their collective error when an independent expert hired by the State pointed it out to them.

of "concerns he had about a specimen of the hyoid bone that had become an issue in his life." [FN4] Baden summarized the purpose of defendant's call as follows:

The basis for the call in large part was that he felt that the Medical Examiner's Office was making a mistake about the nature of a fracture to the hyoid bone that he had examined for a private case.

> And that he felt that if he, Dr. Natarajan ... and myself were to go down and look at the specimen together, that we could see that what he was saying was truthful and accurate and that it would resolve the matter without any further litigation.
>
> I think he explained to me that he was concerned that this was going to go to a grand jury or there was an investigation in process and he wanted to have that stopped, and he felt that if we all agreed that he was correct in what he had seen, that would stop the litigation.

Baden continued:

> Yeah. He had said to me also that there was a citizens committee for an effective medical examiner system in New Jersey who are very upset--I have here "who are infuriated by the way that he was being treated," and that this group felt that it was Dr. Natarajan's fault.
>
> And he felt to me that if--and they were making various protests about what was going on and that he felt that if we all agreed, you know, that what he had said was proper, then the litigation could stop that was aimed at him and that this

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4. Prior to the April 1994 conversation, defendant had asked Baden to be an expert for him. However, Baden said that he did not think he could do so because he had worked with Goode, Natarajan and the Attorney General's office.

concerned citizens committee would also stop their criticisms of the Medical Examiners Office and of Dr. Natarajan.

Again, according to Baden:

> He had asked that if I could arrange a meeting with Dr. Natarajan, that the 3 of us could go down together [and] look at the specimen in question. That we could all probably, he felt, agree that what he was saying was correct and that this, he thought, was his impression, would then stop the litigation against him.
>
> ....
>
> And then the, the protests that the citizens committee were making in various ways, I don't know, by contact with political people and with newspapers, the media, would, would all, criticizing the Medical Examiner's Office and Dr. Natarajan, that would also stop.

And again:

> Well, the basis as I understood, the reason he had contacted me is because he felt that if the three of us could get together, Dr. Natarajan, himself and myself, I acting as a referee, I have down here "sort of a referee," that he thought that we could all as forensic pathologists look at the specimen - - resolve the issues. Show that he wasn't, you know, that he hadn't done what he was accused of and that the attorney general would then drop the litigation, or the investigation into him and that the citizens committee would stop [its] criticism.

Defendant informed Baden that he knew there was an investigation because an assistant attorney general had shown him a certification signed

by Natarajan which had accused defendant of breaking the hyoid bone. [FN5] Baden said that he would pass that information along, though he did not believe it was "something that could be done in any kind of legitimate way."

Baden had no doubt that defendant's original request for a meeting included advising the Attorney General's office of the request. Although Baden was sure that defendant wanted the Attorney General's office to know about the meeting, defendant also told Baden that he wanted to get together "as three professional persons" without an attorney general present.

On another note, defendant told Baden:

> Yeah. He had indicated ... toward the end of that conversation, he had indicated to me that when I speak to Dr. Natarajan, I think to advise her, that he had checked with a medical society called Society of Medical Jurisprudence and had spoken to one of the officers in that society and had determined that Dr. Natarajan was indeed a member of that society.
>
> And that he had so advised the citizens committee which apparently had previously sent out some kind of information to various media and other persons that Dr. Natarajan had not told the truth in her curriculum vitae by saying she was a member of this society when she wasn't.
>
> And that now that he ... was personally ... able to determine that she was indeed a member, he had contacted the citizens committee and had them send out letters of retraction to all the people that they originally sent out the letters of accusation and that he was pleased that he was able to correct that matter.

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5. The assistant attorney general testified at trial that he never showed defendant a certification signed by Natarajan, he never told defendant about any such document, and he was not even aware of any such document.

Defendant also asked Baden to assure Natarajan that defendant did not want to be the state medical examiner and that he would like to work with her to make the examiner's office "a better system than it was." [FN6] Baden told defendant that he had received a telephone call from a New Jersey Law Journal reporter earlier in the day and that he was concerned because the reporter's "spin" on the story was that Natarajan and the state medical examiner's office were out to get defendant.

The next day, Baden called Natarajan, informed her that he was making the call at defendant's request, and asked her if such an arrangement could be made even though he knew that the medical examiner's office could not bring or drop charges. When Baden asked Natarajan about the certification, she said that she had not signed any certification accusing defendant of improperly handling the bone. Natarajan denied that she had started an investigation or that she had done anything other than report the incident to Goode. Nevertheless, Natarajan said that she would relay the request to the Attorney General's office, which would have to approve any such meeting.

Baden reported this information back to defendant. Defendant responded "something to the effect that he was very glad to hear that, and that should make it all the easier for him to be able to work with Natarajan, once the matter is dropped, for the betterment of the New Jersey State Medical Examiner's Office." The meeting never took place.

In addition to the facts underlying the charges in the indictment, the trial focused upon whether (1) the right side of Puttorak's hyoid bone was fractured; (2) defendant altered the photographs he had taken on November 3, 1993, which did not show a fracture on the left side of the hyoid bone; and (3) two citizens groups, the Concerned Citizens for an Effective Medical Examiner (CCEME) and Romeo 68, were "fronts" for defendant. The first two issues created a "battle of the experts" with conflicting testimony.

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6. Then Governor Florio had nominated Natarajan to succeed Goode as the state medical examiner upon his retirement.

The various experts testified to differing views as to the location of the fracture, whether tissue had been removed, whether the photographs and the actual specimen were the same, whether there was hemorrhaging, and although not generally challenged, whether the fracture was post-mortem and the result of strangulation. In sum, there were substantial factual issues for the jury to determine and sufficient disparate proofs to present a jury question on these issues.

The State attempted to demonstrate that CCEME and Romeo 68 were fronts for defendant by pointing out similarities in letters written by the groups and defendant. The State established that letters from defendant and the CCEME contained the same fax numbers and were similar in other respects, including the form and punctuation of the salutation and closing. Members of CCEME and Romeo 68 fervently disputed the State's position.

After seven days of deliberation, the jury found defendant guilty of tampering with a witness. The jury did not reach a verdict on the other charges.

On appeal, defendant raises the following issues:

> 1. THE STATE'S INABILITY TO SPECIFY WHAT THE DEFENDANT ALLEGEDLY WANTED WITHHELD MASKS A LACK OF JUROR UNANIMITY, AND THE STATE'S SUBSTITUTE THEORY THAT DEFENDANT WANTED TO PERSUADE LAW ENFORCEMENT AUTHORITIES TO DROP AN INVESTIGATION IMPERMISSIBLY REVISED THE INDICTMENT.
>
> A. The Count Three verdict cannot stand because there is no assurance that the jury was unanimous as to which of the two charged crimes defendant supposedly committed.
>
> B. The jury's verdict must be reversed because wanting an investigation dropped does not support the attempted witness tampering accusation.

2. THE INSTRUCTIONS ON COUNT THREE PERMITTED THE JURY TO FIND GUILT FOR CONDUCT WHICH IS NOT CRIMINAL.

A. Plenary appellate review of instructions on the essential elements is required notwithstanding the failure to timely object.

B. The lower court's charge on "knowingly" prejudicially relaxed the "practically certain" standard of N.J.S.A. 2C:2-2b(2).

C. The trial court had to charge "purposely" in accordance with N.J.S.A. 2C:5-1a(3) and N.J.S.A. 2C:5-1b.

D. The jury had to be charged that N.J.S.A. 2C:28-5a does not criminalize seeking truthful testimony; it only criminalizes solicitation of non-cooperation with law enforcement.

3. COUNT THREE MUST BE DISMISSED FOR INSUFFICIENT EVIDENCE.

A. The State's evidence is insufficient to satisfy the N.J.S.A. 2C:2-2b(2) requirement that the intended criminal result must be "practically certain."

B. The State's evidence is insufficient to satisfy the N.J.S.A. 2C:5-1b requirement of a "substantial step strongly corroborative of criminal purpose."

C. The State's evidence is insufficient for a rational fact-finder to find beyond a reasonable doubt that Dr. Speth was attempting to undermine law enforcement.

4. THE WHOLE INDICTMENT SHOULD BE DISMISSED

ON ACCOUNT OF THE STATE'S INTENTIONAL SPOLIATION OF EXCULPATING EVIDENCE.

We have carefully reviewed the voluminous record in this matter and conclude that defendant's arguments as to Points 3 and 4 are without merit. R. 2:11-3(e)(2). We offer the following observations regarding issues raised by Points 1 and 2 which require further discussion.

A.

In arguing that his right to jury unanimity was violated, defendant argues that the indictment had to identify (1) whether defendant tried to induce Natarajan to withhold testimony or evidence and (2) which particular testimony or physical evidence. Instead, according to defendant, the indictment (1) listed "two different generic crimes in a single count," namely the withholding of testimony and the withholding of physical evidence and (2) failed to identify which particular testimony or physical evidence defendant allegedly tried to have Natarajan withhold. Defendant asserts that the jurors were required to be unanimous on which "genus" of witness tampering defendant committed--the withholding of testimony or the withholding of physical evidence.

Defendant's assertion is erroneous. Count Three, charging defendant with witness tampering, only charges defendant with one crime--knowingly attempting to induce Natarajan to "withhold testimony or physical evidence" at a time when he was "aware that an investigation and/or court proceedings were pending." Defendant was alleged to have committed one act of witness tampering based on a single act, the phone call to Baden. Defendant did not make a phone call to Baden and suggest that Natarajan withhold testimony and then make another call to suggest that Natarajan withhold physical evidence.

Defendant's reliance on ***State v. Krieger***, 285 N.J.Super. 146, 153, 666 A.2d 609 (App.Div.1995), is misplaced. ***Krieger***, which involved a challenge to an indictment, charged defendant with two distinct crimes--tampering with a witness to prevent his own apprehension and

tampering to hinder another's apprehension. N.J.S.A. 2C:29-3a and b. The two crimes involved different elements.

The indictment here, the particulars of which are primarily the focus of defendant's attack, tracked the statute. It represented a pleading which could have been challenged on these grounds in a pre-trial application [FN7] or by way of a bill of particulars. ***Cf. State v. Mello***, 297 N.J.Super. 452, 688 A.2d 622 (App.Div.1997) (rejecting a challenge to an indictment asserting that it failed to specify the unlawful purpose for possession of a firearm). The criminal episode which formed the basis of the indictment, defendant's phone call to Baden, supports the conclusion that defendant was not charged with two crimes but with two theories of one crime, a pleading methodology sanctioned by ***Krieger, supra***, 285 N.J.Super. at 153, 666 A.2d 609.

Defendant next contends that Judge Cohen committed reversible error by refusing to grant a judgment of acquittal notwithstanding the verdict on the witness tampering charge. According to defendant, the indictment was impermissibly amended because the State's case consisted of nothing more than the fact that defendant wanted the State to drop its investigation into whether he had broken Puttorak's hyoid bone. Defendant argues that an individual's desire to have an investigation dropped is not witness tampering. In short, defendant maintains, "[w]anting the investigation stopped is not a crime." According to defendant, the prosecutor was required to specify "what testimony or what physical evidence [he] supposedly importuned Dr. Natarajan to withhold." Finally, defendant asserts that nowhere in the record is he "quoted as asking, directly or indirectly, that ... Natarajan withhold from investigators or the grand jury any testimony or physical evidence." Defendant's contention is without merit.

In denying defendant's motion for judgment of acquittal, Judge Cohen aptly observed:

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7 Defendant brought a pre-trial application to dismiss the indictment but urged other reasons for dismissal.

> I specifically do not agree with the claim that there was nothing that the jury could have found that the defendant was attempting to induce Dr. Natarajan to withhold. Quite clearly and quite obviously, the jury found, and based on the evidence presented to it could find reasonably, that the defendant was attempting to induce Dr. Natarajan to withhold her testimony that would implicate him in the tampering with physical evidence and at least the tampering with physical evidence charge dealing with the breaking of the hyoid bone and the fact that when she examined it almost immediately after Dr. Speth had examined it she found what she described as an obvious artifactual fracture of that bone made after death with no associated hemorrhage contrary to what Dr. Speth said he found which was a fracture made before death with associated hemorrhage on it. And, of course, we know, having sat through the entire trial, the significance of the differences in those kinds of findings.

The standard for deciding a R. 3:18-2 motion for judgment of acquittal notwithstanding the verdict is the same as that used to decide a motion for acquittal made at the end of the State's case or at the end of the entire case, ***State v. Kluber***, 130 N.J.Super. 336, 341-42, 327 A.2d 232 (App.Div.1974) (citations omitted), certif. denied, 67 N.J. 72, 335 A.2d 25 (1975), to wit:

> The trial judge must decide whether the evidence is sufficient to warrant a conviction. More specifically, the trial judge must determine whether the evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, is sufficient to enable a jury to find that the State's charge has been established beyond a reasonable doubt. On such a motion the trial judge is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State.

Clearly, it is not a crime for anyone under investigation to want the investigation stopped. Moreover, "[a] mere request for investigational or testimonial assistance ought not to be criminalized on the basis that it might be construed as an effort to suppress evidence." ***Krieger, supra,*** 285 N.J.Super. at 152, 666 A.2d 609; ***cf. State v. Rempel***, 114 Wash.2d 77, 785 P.2d 1134, 1136-37 (1990) (requesting a victim to "drop the charges" without more is not witness tampering).

However, the case against defendant was not merely based upon his "wanting an investigation stopped." The case centered upon what defendant did in order to achieve his objective, and the context of defendant's statement clearly could lead the jury to believe that he attempted to tamper with Natarajan. Defendant's telephone conversation with Baden contained more than the expression of his desire to have the investigation stopped. It contained more than a request for a meeting. Defendant's conversation with Baden suggested in no uncertain terms that if there was a meeting and the investigation was dropped, then Natarajan would be rewarded, as the CCEME's criticisms of her would stop. ***Id.*** at 1137; ***State v. Cavallo***, 200 Conn. 664, 513 A.2d 646, 649-50 (1986) (finding that the defendant offered witness a "possible pecuniary reward" in exchange for false testimony).

Although defendant purportedly wanted the Attorney General to know about his request, he certainly did not want anyone from the Attorney General's office present during the meeting. In addition, in what could have been interpreted as defendant's willingness to "work with" Natarajan in getting the CCEME "off her back," he told Baden to tell Natarajan that he had already directed the CCEME to send out a letter of retraction with respect to one of the group's accusations against her. Finally, perhaps to demonstrate his "good faith," defendant requested that Baden assure Natarajan that he (defendant) did not want to be the state medical examiner, a position she was being considered for at the time. Here the jury appraised the facts--as was its duty--and rejected defendant's suggestion that his statements to Baden were innocent.

The fact that defendant never asked Natarajan to withhold testimony or evidence is of no moment. It would be meaningless to limit witness

tampering to instances where a defendant directly asks a witness to obstruct justice. This would exclude indirect attempts to tamper with witnesses by making comments either to third parties knowing that they will get back to the witness or even making comments directly to the witness, which, on the one hand, could be innocent, but in the context of the facts, could be threatening. In ***State v. Crescenzi***, 224 N.J.Super. 142, 147, 539 A.2d 1250 (App.Div.), ***certif. denied***, 111 N.J. 597, 546 A.2d 520 (1988), defendant did not speak directly to the witnesses; he spoke to two other people, knowing that his comments would get back to the witnesses. While our opinion did not detail defendant's words to the third parties, it seems evident that although seemingly innocent in content, they were menacing in context. As we observed:

> The key, of course, is the jury's appraisal of the context, as well as the content of a statement. Uttered in one context, an apparently innocent statement such as, "I'd be careful crossing the street if I were you" can be merely helpful advice to a senior citizen. Uttered in another context it may well be correctly perceived by reasonable persons to be intended as a threat.

[*Id.* at 147-48, 539 A.2d 1250.]

Thus, it is of no consequence that defendant neither directly approached Natarajan and asked her to withhold testimony or evidence nor asked Baden to ask her to withhold testimony or evidence. Judge Cohen properly denied defendant's motion for judgment notwithstanding the verdict.

B.

Defendant also contends that Judge Cohen erroneously failed to charge the jury on the applicable meaning of "knowingly" and "purposely." Defendant argues that the judge should have defined "knowingly" as being "'aware that it is practically certain that his conduct will cause' the forbidden result," and "purposely" as taking a "'substantial step' which is 'strongly

corroborative of the actor's criminal purpose.'" According to defendant, "[e]ach error in the jury charge, without more, commands reversal." This contention is without merit.

Judge Cohen instructed the jury on the "knowingly" and "purposely" elements of witness tampering as follows:

> The second element here is that the defendant knowingly attempted to induce or otherwise cause a witness to withhold testimony or anything else.
>
> Knowingly is as I already defined it for you. I won't repeat it again. It refers to the defendant's state of mind. Is he aware, comprehends, knows, understands what he was doing?
>
> Did he attempt to induce ... Dr. Natarajan through Dr. Baden to withhold testimony or evidence? Attempt is another legal term of art. When you attempt something you have to do something towards committing an act, have a purpose in your mind to complete the act but fail to complete it.
>
> If I were to take a gun loaded gun, I point it at an individual with the purpose in mind of shooting and injuring that individual, pull the trigger, fire the bullet but I miss, we would say I attempted to shoot him. I did something. Pointed a loaded gun and pulled the trigger. I had the purpose in mind to complete the act but through something outside of myself, I didn't complete it. I missed.
>
> If I hit it, it wouldn't be an attempt. It would be an actual shooting. So that is an attempt. Did you do something, have the purpose to complete the act but failed to complete, due to some outside source.
>
> In this case did Dr. Speth do something to get Dr. Natarajan to withhold testimony or evidence? Did he call Dr. Baden ... and try to get him to intercede, and did he tell him about

> some kind of quid pro quo to induce Dr. Natarajan to do that? Did he have the purpose of causing her not to testify, or to withhold evidence? And did he fail to complete it? Because, in fact, it didn't work, according to the State's theory. Dr. Natarajan, first of all, Dr. Baden went to the authorities, and Dr. Natarajan did ultimately testify.
>
> Was there this attempt? And was the defendant's purpose to influence the behavior of the witness? Having the purpose did he knowingly engage in the attempt to induce or otherwise cause Dr. Natarajan to withhold testimony or anything else?
>
> If you are satisfied beyond a reasonable doubt of all of these elements, that Dr. Speth knowing that or believing that an official proceeding or investigation was pending or about to be instituted against him, did he knowingly attempt to induce or otherwise cause a witness, Dr. Natarajan, to withhold testimony or evidence against him? Did he do this with the purpose of causing her not to testify?

Judge Cohen initially instructed the jury on the meaning of "knowingly" during his charge on the first count of the indictment, tampering with physical evidence. The judge charged:

> The second element of this offense is that the defendant knowingly altered the hyoid bone. Knowingly is what? It's a state of mind. It's what's going on inside someone's head. Knowingly means he understood, he was aware of, he comprehended. He knew in other words what he was doing when he broke the bone; if he did break the bone.
>
> Knowledge is a state of mind. You can't see it or touch it like you can see or touch this pen for example. How do you prove what's going on inside someone's head? Remember what I said before about direct and circumstantial evidence? Generally a state of mind, be it knowledge or purpose or

> anything like that, is established by circumstantial evidence. By what someone says; by what someone does; by all the surrounding circumstances.
>
> ....
>
> Now, if you find that this bone, this hyoid bone, was fractured or broken while being handled by Dr. Speth, did he do so knowingly? If it was broken accidentally that standard would not have been met here.

Defendant did not object to the jury instructions at trial; therefore, he waived his right to object on appeal, R. 1:7-2, except as plain error. R. 2:10-2. ***See State v. Afanador***, 151 N.J. 41, 54, 697 A.2d 529 (1997).

With respect to jury charges, "[e]rroneous instructions on matters or issues that are material to the jury's deliberation are presumed to be reversible error in criminal prosecutions." ***State v. Jordan***, 147 N.J. 409, 422, 688 A.2d 97 (1997) (citation omitted). Here, however, Judge Cohen's instructions were proper given the facts of this case and the language of N.J.S.A. 2C:28-5.

There is a dearth of case law in this State and throughout the United States on witness tampering. New Jersey's witness tampering statute is similar to ***Model Penal Code***, § 241.6 (MPC), [FN8] and many other states have enacted similar statutes based upon the same section. ***Id.*** §

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8. MPC § 241.6 provides in pertinent part:

> (1) Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant to:
>
> (a) testify or inform falsely; or
>
> (b) withhold any testimony, information, document or thing.

241.6 comment 1. However, the New Jersey Legislature inserted the term"knowingly" before the term "attempts" when it enacted our witness tampering statute. Compare MPC § 241.6(1) with N.J.S.A. 2C:28-5a. In ***Crescenzi, supra,*** 224 N.J.Super. at 147, 539 A.2d 1250, we alluded to two distinct definitions of "knowingly" set forth in N.J.S.A. 2C:2-2b(2), which reads in pertinent part:

> A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result.

The statute sets forth two different meanings of the term. ***Town Tobacconist v. Kimmelman***, 94 N.J. 85, 112 n. 12, 462 A.2d 573 (1983). In the second sentence, which defendant claims is the appropriate standard, the focus is on the intended result. For example, in a prosecution for murder and aggravated manslaughter, a knowing state of mind requires a defendant to have been aware or practically certain that his or her conduct would cause death or serious bodily injury resulting in death. ***State v. Clausell***, 121 N.J. 298, 330-31, 580 A.2d 221 (1990). If the defendant acted without caring whether the result occurred or not, then he or she could not have been found to have acted knowingly with regard to the result. ***Id.*** at 331, 580 A.2d 221.

Similarly, in a prosecution for "distribut[ing] or dispens[ing], or possess[ing] with intent to distribute or dispense, or manufactur[ing] with intent to distribute or dispense, drug paraphernalia, ***knowing that it will be used*** ... [,]" N.J.S.A. 24:21-48 [FN9] (emphasis added), the statute's requirement that a seller, "to be found guilty of violating the Act, must

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9. This provision, L. 1980, c. 133, § 3, was repealed by L. 1987, c. 106, § 25, and is now covered by N.J.S.A. 2C:36-3.

'know' that his items will be used for illegal purposes, is satisfied if he is 'practically certain' that the item will be so used." ***Town Tobacconist, supra,*** 94 N.J. at 112, 462 A.2d 573. Additionally, in a prosecution for robbery under N.J.S.A. 2C:15-1, the "inflicts bodily injury or uses force upon another" element requires proof that the actor "knowingly" inflicted the injury or used force. Because "the injury/force element in robbery under the Code involves 'conduct,' and cannot be regarded as simply an 'attendant circumstance' requiring only an awareness by the defendant of its existence," the "practically certain" standard applies. ***State v. Sewell,*** 127 N.J. 133, 147-49, 603 A.2d 21 (1992).

In the case of witness tampering, where the attempt is illegal, the criminal act is completed regardless of whether or not the result is achieved. ***People v. Moyer***, 670 P.2d 785, 791 (Colo.1983) (holding that it is "not necessary that the defendant succeed in his attempt or actually induce the witness to do anything" to be guilty of witness tampering); ***People v. Jelke***, 1 N.Y.2d 321, 152 N.Y.S.2d 479, 135 N.E.2d 213, 219 (1956); Mont.Code Ann. § 45-7-206, annotator's note (crime does not require a showing of success in the altering of the witness's testimony or conduct); ***cf. State v. Robinson,*** 136 N.J. 476, 483, 643 A.2d 591 (1994) ("Criminalization of attempt focuses on the intent of the actor to cause a criminal result, rather than on the resulting harm.").

We conclude that the second definition of "knowingly," which requires the actor to be "practically certain that his conduct will cause such a result," is not an element of the offense and is incompatible with the crime of witness tampering, as it would put undue weight on whether or not the defendant's attempt was likely to succeed. Judge Cohen instructed the jury on the first meaning of "knowingly," that is, whether defendant was aware of the nature of his conduct. In other words, was defendant aware that he was attempting to tamper with a witness. Satisfying this requirement alone to support a conviction is sufficient to meet the societal need to discourage or preclude persons from interfering in the proper administration of justice. The evil to be addressed is approaching the witness rather than the likelihood of successfully convincing that witness not to testify or to alter such testimony.

In N.J.S.A. 2C:28-5, the term "knowingly" modifies the term "attempts." Because the crime is committed regardless of whether the result is achieved, it makes little sense to require the actor to be "practically certain that his conduct will cause such a result." We reject that argument.

Although our decision in ***Crescenzi*** makes reference to the second definition of "knowingly," we read ***Crescenzi*** as referring to that definition only to satisfy that defendant's constitutional challenge to the statute. We do not consider ***Crescenzi*** as requiring proof of the second definition in all cases, and we disagree with any reading of the case which so suggests. We are satisfied that Judge Cohen appropriately and adequately charged the jury on this charge.

Finally, we reject defendant's argument that a "substantial step" charge was necessary to supplement the "attempt" charge. Such a charge would require the jury to find that defendant did something which, "under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." N.J.S.A. 2C:5-1a(3). Generally, such acts must be "strongly corroborative of the actor's criminal purpose." ***State v. Fornino,*** 223 N.J.Super. 531, 540, 539 A.2d 301 (App.Div.), ***certif. denied,*** 111 N.J. 570, 546 A.2d 499 (1988). Defendant's insistence that because he merely requested a meeting, the "substantial step" charge was necessary to avoid "a conviction for any conduct, no matter how unlikely it was to result in a completed crime, and no matter how ***de minimis*** the actual conduct" disregards the critical fact that distinguishes this from the criminalization of simply requesting a meeting. If defendant had merely requested a meeting with Natarajan, perhaps the result would be different. However, defendant's request for a meeting was accompanied by the ***quid pro quo***, in other words, the offer of a reward to Natarajan if she saw things his way. This offer removes all mystery from the true nature of defendant's request. A "substantial step" charge was not necessary here where the attempted tampering was complete upon the offer of the ***quid pro quo***. If defendant had merely requested the meeting, then the substantial step charge may have been necessary because requesting a meeting in and of itself would not necessarily complete the crime "without further conduct on [defendant's] part." N.J.S.A. 2C:5-1a(2).

We affirm the judgment of conviction on the charge of N.J.S.A. 2C:28-5(a).

ORDER DENYING LEAVE TO APPEAL TO NEW JERSEY SUPREME COURT
(January 12, 2000)

This matter having been presented to the Court, it is ORDERED that the motion for leave to file an overlength breief in support of a motion for leave to appeal (M-512) is granted; and it is further

ORDERED that the motion for leave to appeal (M-513) is denied.

APPELLATE DIVISION ORDER DISMISSING APPEAL FROM FINAL JUDGMENT
December 26, 2000

The motion to dismiss the appeal is granted. We granted degfendant leave to appeal and in a published opinion affirmed the judgment of conviction of N.J.S.A. 2C:28-5(a), State v. Speth, 323 N.J. Super. 67 (App. Div. 1999). Defendant's motion for reconsideration was denied pm August 13, 1999. Subsequently, on September 5, 2000, the trial court granted the State's motion to dismiss the two outstanding charges. Defendant filed a second notice of appeal from rulings adverse to defendant that were made in the Law Division. The second notice of appeal seeks the same relief defendant requested in his first appeal, that is, the reversal of his conviction of third-degree witness tampering. An interlocutory order reviewed on leave granted is not subject to further review on a later appeal to this court. State v. Myers, 239 N.J. Super. 158, 164 (App. Div.), certif. denied, 127 N.J. 323 (1990); see also Pressler, Current N.J. Court Rules, comment on R. 2:2-4 (2001).

NEW JERSEY SUPREME COURT ORDER DISMISSING APPEAL
(March 21, 2001)

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss appeal for failure to present a substantial constitutional question is granted.

BENCH OPINION DENYING POST-CONVICTION RELIEF
May 25, 2001 (excerpt)

Next, the petition argues that the State has somehow violated the defendant's First Amendment rights; that the conviction on Count 3 here rests solely on pure speech, specifically Dr. Speth's statement -- statements to Dr. Baden as recounted by Dr. Baden.

Well, number one, procedurally, this argument is barred by Rule 3:22-4. This could have been raised on direct appeal and it wasn't; and, therefore, it cannot be litigated now. In the alternative, to the extent that in -- dressed up in different language --this type of argument was raised, then it's barred by Rule 3:22-5 because you can't, under our post-conviction relief rules, litigate issues and then litigate them again.

Finally -- well, before I get to finally--additionally, there's no legal authority for this argument, so it's not surprising that I haven't been shown any case law on point to support it. The argument is simply, patently absurd.

The argument, on direct appeal, using some different language, seems to have been touched on or touched around on the motion for reconsideration in the Appellate Division in July of 1999. This argument was raised for and dressed up in First Amendment garb and rejected. In August of 1999, on the motion for leave to appeal to the Supreme Court, the Supreme Court also rejected it. And then on -- in, again, the next year the motions to the Appellate Division, in November of 2000, the argument was rejected. And in its opinion, its published opinion in this matter, I just want to quote from

one portion of the Appellate Division's decision. It's on Page lB of the slip opinion. It's a paragraph that says as follows:

However, the case against defendant was not merely based upon his "wanting an investigation stopped." The case centered upon what defendant did in order to achieve his objective, and the context of defendant's statement clearly could lead the jury to believe that he attempted to tamper with Natarajan. Defendant's telephone conversation with Baden contained more than the expression of his desire to have the investigation stopped. It contained more than a request for a meeting. Defendant's conversation with Baden suggested, in no uncertain terms, that if there was a meeting and the investigation was dropped, then Natarajan would be rewarded, as the CCEME's criticisms of her would stop. And it cites the-- cites case law following that language.

I don't find any violation, constitutional or otherwise, of the defendant's First Amendment rights here. And really, I find that argument simply, patently absurd to say that this is, 'pure speech and, therefore, cannot be criminalized.' I can imagine -- I can't imagine, I suppose, all of the crimes in our code of criminal justice that may be committed only or primarily by an act of speech, but they're -- many come to mind; I'm not going to burden the record with them.
The next argument is that the State, somehow, impermissibley amended the indictment as to Count 3 * * *

In light of all of these considerations, the request for an evidentiary hearing must be denied, and the petitioner's petition for post-conviction relief must be denied in its entirety.

APPELLATE DIVISION OPINION AFFIRMING DENIAL OF POST-CONVICTION RELIEF
(November 6, 2002)

DOCKET NO. A-5655-OOT1

PER CURIAM

Following a jury trial, defendant Claus P. Speth was convicted of third-degree tampering with a witness, N.J.S.A. 2C:28-5a. Judge Cohen sentenced defendant to a probationary term of two years together with statutory penalties and assessments. Defendant appealed, and we affirmed the judgment of conviction, State v. Speth, 323 N.J. Super. 67 (App. Div. 1999); and thereafter, we denied his motion for reconsideration. Because additional charges were pending against defendant and his appeal was interlocutory, defendant filed a motion for leave to appeal to the Supreme Court. That motion was denied. The additional charges were then dismissed, and defendant again filed a notice of appeal of his conviction with this court. We granted the State's motion to dismiss the appeal, and defendant appealed to the Supreme Court. On the State's motion, the Court dismissed defendant's appeal. Defendant then filed a petition for post-conviction relief (PCR). Following argument, Judge Cohen entered an order denying such relief. Defendant appeals from that order, and we affirm.

We need not restate the facts surrounding the underlying charge against defendant as they are extensively described in our opinion addressing defendant's direct appeal. Speth, supra, 323 N.J. Super. at 71-78.

On his direct appeal, defendant raised the following issues.

> 1. THE STATE'S INABILITY TO SPECIFY WHAT THE DEFENDANT ALLEGEDLY WANTED WITHHELD MASKS A LACK OF JUROR UNANIMITY, AND THE STATE'S SUBSTITUTE THEORY THAT DEFENDANT WANTED TO PERSUADE LAW ENFORCEMENT AUTHORITIES

TO DROP AN INVESTIGATION IMPERMISSIBLY REVISED THE INDICTMENT.

A. The Count Three verdict cannot stand because there is no assurance that the jury was unanimous as to which of the two charged crimes defendant supposedly committed.

B. The jury's verdict must be reversed because wanting an investigation dropped does not support the attempted witness tampering accusation.

2. THE INSTRUCTIONS ON COUNT THREE PERMITTED THE JURY TO FIND GUILT FOR CONDUCT WHICH IS NOT CRIMINAL.

A. Plenary appellate review of instructions on the essential elements is required notwithstanding the failure to timely object.

B. The lower court's charge on "knowingly" prejudicially relaxed the "practically certain" standard of N.J.S.A. 2C:2-2b(2).

C. The trial court had to charge "purposely" in accordance with N.J.S.A. 2C:5-la(3) and N.J.S.A. 2C:5-lb.

D.The jury had to be charged that N.J.S.A. 2C:28-5a does not criminalize seeking truthful testimony; it only criminalizes solicitation of non-cooperation with law enforcement.

3. COUNT THREE MUST BE DISMISSED FOR INSUFFICIENT EVIDENCE.

A. The State's evidence is insufficient to satisfy the

N.J.S.A. 2C:2-2b(2) requirement that the intended criminal result must be "practically certain."

B. The State's evidence is insufficient to satisfy the N.J.S.A. 2C:5-lb requirement of a "substantial step strongly corroborative of criminal purpose."

C. The State's evidence is insufficient for a rational fact finder to find beyond a reasonable doubt that Dr. Speth was attempting to undermine law enforcement.

4. THE WHOLE INDICTMENT SHOULD BE DISMISSED ON ACCOUNT OF THE STATE'S INTENTIONAL SPOLIATION OF EXCULPATING EVIDENCE.

[Id. at 78-79.]

In his motion for reconsideration from our determination of his direct appeal, defendant raised the following additional issues:

1. The evidence of criminal purpose is far too thin and uncertain to overcome the defendant's First Amendment protections.

A. No advance plan to offer a guid pro quo emerges from the record.

B. Dr. Speth made no effort to conceal his proposal.

C. This Court overlooked facts which confirm innocence.

D. The genuineness of Dr. Speth's photographs cannot be disputed.

E. Criticism would cease if and only if Dr. Natarajan and Dr. Baden both concluded after an honest professional review that Dr. Speth had not tampered with the hyoid bone.

F. The record is bereft of clear and convincing evidence that Dr. Speth went beyond his First Amendment freedoms.

G. By overlooking its Turf Lawnmower responsibilities, this Court has set a dangerous precedent.

2. The State, by trying Count 3 together with Count 1, the manufactured accusation of breaking the bone, subjected Dr. Speth to an unacceptable risk of a compromise verdict.

3. The gag order should be vacated forthwith because that order subverts the founders' expectation that an aroused citizenry would exercise the ultimate check on abuse of governmental power.

And on in his PCR, he asserted the following errors:

1. The State's failure to disclose crucial exculpating evidence.

2. The State's violation of defendant's First Amendment rights.

3. The State impermissibly amended the indictment on Count 3.

4. The State's violation of the Ex Post Facto clause.

5. Prosecutorial misconduct denied defendant a fair trial.

6. Ineffective assistance in not seeking a bill of particulars.

7. Ineffective assistance in not requesting a jury charge that seeking the truth is not a crime.

8. Ineffective assistance in the totality of services rendered.

After consideration of defendant's PCR, Judge Cohen, in a bench opinion, denied defendant's prayer for relief.

Defendant now appeals and raises the following issues in his brief:

1. The repeated rewriting of the indictment was unconstitutional.

A. Count Three of the indictment was rewritten at every stage of the proceedings, thereby violating both the New Jersey and United States Constitutions.

1. The witness tampering crime which the grand jury in fact considered and charged.

2. The putative offense of wanting to stop an investigation upon which the State actually went to the jury.

3. The bribery offense substituted by the Appellate Division.

B. The Appellate Division's conversion of the accusation into one sounding in bribery worked a new and

independent violation of defendant's constitutional rights.

1. The Appellate Division trivialized Dr. Speth's right to a trial by jury.

2. The Appellate Division retrospectively rewrote the law.

(a) An offer to withhold criticism did not constitute a species of bribery crime at the time Dr. Speth spoke to Dr. Bladen.

(b) The Appellate Division unconstitutionally reduced the State's burden of proof.

2. Defendant received ineffective assistance of counsel.

A. A defense counsel's failure to investigate and pursue factual and legal leads is per se ineffective assistance.

B. The prejudice flowing from the failure to seek a bill of particulars is palpable.

C. Defense counsel's complete silence as the State effectively amended the indictment exacerbated the failure to seek clarification of Count Three.

D. Defense counsel's failure to seek a Crescenzi-based instruction was prejudicially deficient.

E. Defense counsel did not object to the prosecutor's blatant misstatements of the evidence.

F. The totality of defense counsel's errors and omissions constituted ineffective assistance.

3. The First Amendment requires clear and unambiguous evidence of criminality before pure speech can be punished.

A. Pure speech cannot constitutionally be criminalized by innuendo.

B. The record lacks the required clear and convincing evidence that would put Dr. Speth's speech beyond the protection of the First Amendment.

C. No recognized exception to the First Amendment's requirement of imminent harm is applicable to Dr. Speth's words.

4. Unless the conviction is vacated, an evidentiary hearing is required into the asserted Brady violation.

In his reply brief, defendant raises yet additional arguments:

1. The State cavalierly disregards the Constitution.

2. The procedural bars raised by the State do not apply when fundamental constitutional rights have been violated.

3. The State does not and cannot respond to the dispositive fact that Dr. Speth's conviction rests on a novel and unforeseeable construction of the statute at issue in count three.

4. In derogation of the State and Federal Constitutions, the substance of the accusation changed repeatedly.

5. Dr. Speth was denied the effective assistance of counsel on count three.

6. The State repeatedly distorts the record and misstates the law.

We have carefully reviewed the entire record in this appeal and conclude that defendant's arguments are without merit, R. 2:11-3(e)(2), and we affirm substantially for the reasons set forth in Judge Cohen's thorough and thoughtful oral opinion of May 25, 2001. We note, as did Judge Cohen, that most of the issues raised were either cognizable in the direct appeal and are thus barred under R. 3:22-4, (precluding consideration of claims not raised on direct appeal) or were addressed on the direct appeal and are barred under R. 3:22-5, (precluding consideration of claims previously adjudicated on the direct appeal). See State v. Goodwin, 173 N.J. 583, 593 (2002). Simply restating the arguments does not give them new life or avoid the preclusion of the cited rules. Thus, a challenge to the indictment or defendant's claim as to the nature of the charge are matters for direct appeal and not for post-conviction relief. Defendant's challenges to our decision affirming his judgment of conviction is likewise inappropriate for post- conviction relief. Such challenge is appropriately addressed by either an appeal as of right to the Supreme Court, R. 2:2-1(a), or a petition for certification, R. 2:2-1(b). Defendant's unsuccessful challenges to the Court preclude further review in a post-conviction proceeding.

We also note our agreement with Judge Cohen that Dr. Ronald K. Wright's affidavit and Dr. Baden's response did not constitute a Brady[1] violation. The hearsay affidavit of Dr. Wright, purporting to relate a post-conviction conversationwith Dr. Baden as to the latter's opinion of the

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1. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

merits of the case, is neither cognizable as admissible evidence nor Brady material. With due respect to Dr. Baden, his opinion as to the merits of the proofs or the bona fides of the charges against defendant are of no moment; moreover, nothing is presented by defendant's then attorney to suggest that trial counsel would have done anything differently if he had been aware of Dr. Baden's conversation with the prosecutor. State v. Cummings, 321 N.J. Super. 154 (App. Div.), certif. denied, 162 N.J. 199 (1999). In sum, Judge Cohen addressed each issue raised in the wright affidavit and ultimately gave it little weight, a finding that appears well supported by the record.

Finally, defendant's claims of ineffective assistance of counsel focusing on counsel's failure to seek a bill of particulars, failure to secure a charge under State v. Crescerizi, 224 N.J. Super. 142 (App. Div.), certif. denied, 111 N.J. 597 (1988), failure to object to "the prosecutor's blatant misstatements of the evidence," and the "totality of defense counsel's errors and omissions" were all addressed in detail by Judge Cohen in his oral opinion denying relief.

In Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and United States v. Cronic, 466 U.S. 48, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the United States Supreme Court enunciated the test for effective assistance of counsel, adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). Recognizing the soundness and efficacy of both the substance and formulation of the federal constitutional standard, our Court held that:

> [U]nder Article I, paragraph 10 of the State Constitution a criminal defendant is entitled to the assistance of reasonably competent counsel, and that if counsel's performance has been so deficient as to create a reasonable probability that these deficiencies materially contributed to defendant's conviction, the constitutional right will have been violoted.
>
> [Ibid.]

See also State v. Goodwin, 173 N.J. 583, 596-98 (2002); State v. Allah, 170 N.J. 269, 282-84 (2002), State v. Bey, 161 N.J. 233,

251-52(1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2693, 147 L.Ed. 2d 964 (2000).

In order to state a prima facie case of ineffective assistance of counsel, defendant must first demonstrate that his attorney's performance was deficient in that it fell below an objective standard of reasonableness. See Fritz, supra, 105 N.J. at 58. However, "[c]ounsel need not fear of being found to have acted below an acceptable standard of care for failing to make every conceivable motion [or argument) that can be made on behalf of his client." State v. Love, 233 N.J. Super. 38, 45 (App. Div.), certif. denied, 118 N.J. 188 (1989). Judge Cohen concluded that defendant failed to demonstrate that either of his experienced trial counsel were ineffective or that their conduct impacted on the ultimate jury verdict in this case. In sum, defendant failed to meet his burden under Strickland.

Affirmed.

NEW JERSEY SUPREME COURT ORDER DENYING CERTIFICATION

(January 23, 2003)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5655-00 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

VERIFIED PETITION FOR POST-CONVICTION RELIEF
December 5, 2000 (excerpt)

2. THE STATE'S VIOLATION OF DEFENDANT'S FIRST AMENDMENT RIGHTS

29. The conviction on Count 3 rests solely upon pure speech, namely, Dr. Speth's statements to Dr. Baden as recounted by Dr. Baden.

30. Dr. Speth cannot be validly convicted of any crime based upon pure speech unless this speech is clearly and unequivocally shown to be outside the protections of the First Amendment. Dr. Speth's words in this case are at the core of the First Amendment's free speech and petition for redress freedoms, because they involved an effort to have the State correct what Dr. Speth reasonably believed to be a substantial error.

31. The First Amendment bars any criminal conviction based on pure speech which can reasonably be understood, as Dr. Baden evidently understood Dr. Speth's words, to be wholly innocent in purpose.

32. Dr. Speth's speech at issue in Count 3 falls within none of the recognized exceptions to the First Amendment's protections: The words were not obscene; they were not so-called "fighting words"; they did not produce a clear and present danger of a serious substantive evil; they did not incite or produce imminent lawless action.

33. Based on all of the foregoing, the conviction on Count 3 violates Dr. Speth's First Amendment protections under the Free Speech Clause and the Petition for Redress Clause, both of which are made applicable to the State by the Fourteenth Amendment's Due Process Clause, as well as violating Dr. Speth's free speech protections under the New Jersey Constitution, Art. 1, ¶ 6.

34. Because the State's evidence is insufficient to overcome Dr. Speth's First Amendment protections, Dr. Speth is entitled to have the judgment of conviction on Count 3 vacated and the indictment dismissed with prejudice.

BRIEF SUPPORTING PETITION FOR POST-CONVICTION RELIEF

May 21, 2001 (excerpt)

POINT 4: THE FIRST AMENDMENT REQUIRES CLEAR AND UNAMBIGUOUS EVIDENCE OF CRIMINALITY BEFORE PURE SPEECH CAN BE PUNISHED

The judgment of conviction on Count 3 offends the First Amendment. Speech, under the First Amendment, is strongly protected against censorship or punishment by the State. This protection is especially strong where, as here, at issue is nothing more than speech and the speech involves a core First Amendment value, namely, an effort to petition a government official for redress.

Pure speech can only be made the basis for "censorship or punishment" if it "is shown likely to produce a clear and present danger of a serious substantive evil," ***Terminiello v. Chicago***, 337 U.S. 1, 4 (1949); or if the speech is "inciting or producing imminent lawless action," ***Brandenburg v. Ohio***, 395 U.S. 444, 447 (1969); or if the speech is obscene or constitutes so-called "fighting words." ***Cohen v. California***, 403 U.S. 15, 20 (1971). Dr. Speth's utterances to Dr. Baden, upon which the Count Three verdict rests, do not come close to fitting into any of the narrow First Amendment exceptions recognized by the Supreme Court. The State has never disputed this.

In the interlocutory appeal, the Appellate Division imputed to the jury a view of the evidence and inferences drawn therefrom as establishing criminal intent. Such deference to the jury is misplaced when First Amendment freedoms are in issue because the fabric of democracy cannot tolerate the risk of legitimate speech being criminalized, even through mistaken factfinding. Justice Brennan, speaking for the Court, announced this controlling principle in ***Speiser v. Randall***, 357 U.S. 513, 526 (1958) (citation omitted):

> [W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken

> factfinding -- inherent in all litigation -- will create the danger that the legitimate utterance will be penalized.
>
> . . . . Where, as here, core First Amendment freedoms are at issue, including the right to petition the government for redress of grievance, the Constitution will not countenance the normal risk of mistaken factfinding. *Speiser*. . . .

Appellate courts have propounded a number of complementary tests to eliminate the risk that legitimate speech will be punished through mistaken factfinding. These tests cumulatively require (A) that by virtue of the time, place, manner or purpose of the speech, the speech must create a clear and immediate threat to a legitimate State interest; and (B) that appellate courts must undertake an independent judicial review of the whole record, ***without deference to the jury's findings***, in a search for clear and convincing evidence of wrongful purpose; and (C) that the speech to be condemned is unambiguous, ***i.e.***, not reasonably susceptible of an innocent meaning. Dr. Speth's conviction on Count Three violates the First Amendment because the State cannot pass any one of these tests when the State is required to pass all three of these tests in order to avoid dismissal of Count 3 under the First Amendment.

A. No recognized exception to the First Amendment's protection is applicable to Dr. Speth's words. The First Amendment protects pure speech except in narrowly-defined circumstances, such as "clear and present danger of substantive evil," ***Terminiello***, 337 U.S. at 4; "inciting or producing imminent lawless action," ***Brandenburg***, 395 U.S. at 447; and the "obscene," ***Cohen***, 403 U.S. at 20.

None of these recognized narrow exceptions reaches any of Dr. Speth's words in his telephone conversations with Dr. Baden. The judgment of conviction therefore offends the First Amendment.

B. The mandatory "independent" judicial review of the whole record will not find the required clear and convincing evidence that Dr. Speth's speech enjoys no First Amendment protection. An additional mandatory First Amendment safeguard was summarized in ***Bose Corp. v.***

Consumers Union, 466 U.S. 485, 499 (1984), and repeated in ***Milkovich v. Lorain J. Co.***, 497 U.S. 1, 17 (1990) (ellipses in original):

> "[I]n cases raising First Amendment issues . . . appellate court[s] must . . . make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression."

It makes no difference that ***Milkovich*** and ***Bose*** were civil rather than criminal proceedings. Speech which provides no constitutional basis for a private civil recovery cannot possibly provide a constitutional basis for the State to impose the more onerous burden of criminal sanctions.

The Appellate Division neglected to conduct the required "***independent*** examination of the whole record" mandated by ***Milkovich*** and ***Turf Lawnmower Repair, Inc. v. Bergen Record Corp.***, 139 N.J. 392, 403 (1995). Instead of conforming to these controlling authorities, the court admittedly deferred to the factfinder when it held that "defendant's statement clearly ***could*** lead the jury to believe that he attempted to tamper with Natarajan," and that "[h]ere the jury appraised the facts -- as was its duty -- and rejected defendant's suggestion that his statements to Baden were innocent." ***Speth***, 323 N.J. Super. at 82 (emphasis supplied).

Milkovich and ***Turf Lawnmower*** require a much more demanding judicial inquiry when free speech is in issue, an inquiry which, being "an ***independent*** examination," disregards what inferences a jury "could" or even did draw from pure speech, and instead searches for clear and convincing evidence that the speech was not constitutionally protected. To date, no court has undertaken this constitutionally-mandated inquiry.

Any fair and independent assessment of the whole record would conclude that the evidence of criminal purpose is sparse and anything but clear and convincing. The statements and testimony of Dr. Baden that were earlier reviewed to demonstrate that the prosecutor lied during the closing argument show that Dr. Speth was exercising his First Amendment rights of speech and petition; that in Dr. Speth's view any cessation of criticism

would naturally flow from the demonstration that Dr. Speth did not tamper with the specimen. Moreover, only the most confused or paranoid of minds could find criminal intent when Dr. Baden testified unequivocally that "Dr. ***Speth wanted the Attorney General's office to know*** of his proposal that [Drs. Baden, Natarajan and Speth] sit down and discuss the matter." 9/19T.114-18 (emphasis supplied).

In short, the required "independent examination of the whole record," ***Milkovich***, 497 U.S. at 17, ineluctably leads to the conclusion that the pertinent proofs clearly and convincingly show that Dr. Speth's statements to Dr. Baden were privileged by the First Amendment from criminal prosecution. ***Speiser***; ***Milkovich***; ***Turf Lawnmower***. The conviction on Count 3 must therefore be vacated and the indictment must be dismissed.

C. Pure speech cannot be criminalized by innuendo. Pure speech, to be punished, must not be reasonably capable of both an innocent and an unlawful meaning. Ambiguous utterances are constitutionally privileged under the First Amendment unless they are linked to unambiguous statements, unlawful action, or subsequent acts "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated." ***United States v. Spock***, 416 F.2d 165, 173 (1st Cir. 1969). No such link is present in the case at bar.

The ***Spock*** analysis, consistent with ***Speiser***, ***supra***, compels an acquittal in this case because Dr. Speth's pure speech reasonably supports a completely innocent meaning, even when viewed in the light of the uncharged bribery theory of criminality which the Appellate Division adopted: Once Dr. Baden and Dr. Natarajan "would see that he was right, that he had not tampered with the specimen," then in the natural course of events "the investigation of him would stop," after which Dr. Speth speculated that the "people infuriated by the way Dr. Speth was being treated" would, because of the change in treatment, "stop . . . the criticism of the State Medical Examiner system and [of] Dr. Nat." S-40 at 1.

The same result can be reached from another direction. Liability for defamation cannot, under the First Amendment, be based on innuendo, that is, by insinuating libelous meanings not clearly contained within the

utterance. ***DeFalco v. Anderson***, 209 N.J.Super. 99, 107 (App. Div. 1986). For the same reason, in a criminal proceeding, speech such as Dr. Speth's telephonic utterances to Dr. Baden regarding Dr. Natarajan, a public official, must not be punished by insinuating criminal meanings which are not clearly contained within the utterance. To borrow again from the prosecutor's closing argument, Dr. Speth was merely "saying that if it turns out that I'm right and you're wrong, the criticisms will stop." 10/9T.192-24. As that is all Dr. Speth ever said, the First Amendment will not tolerate the Count Three conviction. ***Speiser***.

The trial record is utterly bereft of evidence which, as ***Milkovich*** and ***Spock*** and ***Turf Lawnmower*** and ***DeFalco*** all require, ***unambiguously*** indicates that Dr. Speth's speech had anything other than the innocent purpose of seeking an opportunity to demonstrate the truth and thereby stop perpetuation of a highly publicized preindictment accusation that was destroying Dr. Speth's ability to earn an honest living. Notably, New Jersey provides constitutional protection to the right to earn an honest living. Art. I, ¶ 1, N.J. Constitution. ***See Peper v. Princeton University Board of Trustees***, 77 N.J. 55, 77-78 (1978).

Even as to the bribery theory of criminality which the Appellate Division improperly adopted, the prosecutor has already confessed ambiguity in the evidence. Specifically, the prosecutor necessarily admitted ambiguity when he urged a finding of guilt by innuendo in his closing argument (10/9T.194):

> Now, a less sophisticated person would not, would not have used this type of code language. A less sophisticated person would perhaps have said something like: If you get the investigation against me to stop, I'll pay you $500 or, you know, I'll give you $1,000 to stop the investigation against me.

There was no testimony, lay or expert, that Dr. Speth and Dr. Baden were talking in "code language." The prosecutor's imputation of criminality from a "code[d]" meaning therefore admitted to a gaping ambiguity in what Dr. Speth actually said, his ***uncoded*** speech. On a record completely

devoid of testimony indicating that "code language" was used, the First Amendment will not permit juries to fill the gap in the State's proofs and impute a criminal meaning to pure speech which fairly may be understood as wholly innocent. ***Milkovich***; ***Speiser***; ***Spock***; ***DeFalco***. For this reason alone, the First Amendment, made applicable to state proceedings by the Due Process Clause of the Fourteenth Amendment, mandates that post-conviction relief be granted and that the indictment be dismissed.

Finally, it bears remembering that the jury received no instructions regarding the First Amendment. The jury therefore made no findings of fact which control any of the three constitutional tests discussed in this Point 4. Under each of these three tests, the verdict on Count 3, which may well be a compromise verdict, impermissibly criminalizes Dr. Speth for exercising First Amendment freedoms. Accordingly, the First Amendment requires that the judgment of conviction on Count Three be vacated and that the only remaining count of the indictment be dismissed.

STATEMENT OF DR. MICHAEL BADEN TO CAPTAIN JOSEPH TESI

April 8, 1994 (excerpt)

Q. You have informed us that you have had three telephone conversations with Doctor Speth, beginning on Tuesday, April 5, 1994. Is that correct?

A. Yes.

Q. Can you tell us the content of each of those conversations and when they took place?

A. Yes. Doctor Speth had called me at home Tuesday evening of the week, April 5th. As a followup on some material that he had previously sent to me. He asked me if I would agree to act as a

referee, to examin[e] a Hyoid Bone, which he had been accused of tampering with. He told me that if he and Doctor Natarajan and I were to examine the specimen, and the fracture that he had found was real and had happened while the individual was still alive. And not when he had examined it.

Q. Did you know what Case Doctor Speth was refering to?

A. Yes, I had read a number of newspaper articles describing problems that had developed after Doctor Speth had examined the Hyoid Bone of someone who had been found hanging in a jail cell in Essex County. Peter had in fact called me about this matter, a few weeks or a month or two ago, to ask me if I would he his expert in reviewing the specimen that was being questioned. I had declined. He had then Federal Expressed to me a letter dated March 19th, 1994, concerning this same issue and his telephohne call to me as a followup on that letter. I told Peter that I was concerned about a telephone conversation that I had earlier that same day with a reporter Linda Bean, whose questions of me indicated that she was in the process of doing an article sever[e]ly criticizing the New Jersey State Medical Examiner system and Doctor Natarajan, on the basis of trivial and incorrect information, supplied to her by a group supporting Doctor Speth. Peter advised me that this group was called Concerned Citizens for an Effective Medical Examiners, and that it was created by people infuriated by the way Doctor Speth was being treated, and that it was his impression and the group's impression, that Doctor Natarajan was responsible for the investigation that was being conducted of Doctor Speth. Peter told me that an Assistant Attorney General Zakowitz had shown him a certified document signed by Doctor Nat asking for the Attorney General to investigatehim for tampering with the Hyoid Bone. I told Doctor Speth that I would attempt to advise Doctor Nat and the Attorney General's office of his suggestions and of our conversation as he implored me to do. He also volunteered to me, to demonstrate

his good faith, that he had that same day had the citizens committee send out letters of retraction to everyone that had previously wirtten to, when he had learned Doctor Nat was indeed a member of a medical organization listed in her c.v. which the committee had claimed was a false entry. Peter made it clear to me that if the charges against him were dropped, that the charges against Doctor Nat by this committee would stop and that then he would be glad to work with Doctor Natarajan to make the New Jersey Medical Examiner system the best in the Country.

Q. Did Doctor Speth ask you to relay this information concerning the dropping of charges and the ceasing of activities of the Citizens Group to Doctor Natarajan or anyone else?

A. Doctor Speth asked me to advise Doctor Nat and the Attorney General personnel that if we examined the Hyoid Bone together and determined that Doctor Speth was correct, and that therefore the charges against him would be dropped, the citizens' committee would stop criticizing Doctor Nat and the State Medical Examiner Office.

PETITION FOR CERTIFICATION TO THE NEW JERSEY SUPREME COURT

(excerpts)

[QUESTIONS PRESENTED:] 3. Does a criminal conviction for pure speech seeking to obtain an opportunity to demonstrate the truth to law enforcement personnel violate the New Jersey and United States Constitutions' guarantees of free speech, especially when the lower courts never conducted the "independent examination of the whole record" for "clear and convincing evidence" of criminality which controlling precedents require?

* * *

3. Disregarding the First Amendment. Petitioner stands convicted for nothing other than pure speech protected by the First Amendment's free speech clause. As the First Amendment's petition for redress clause verifies, no speech is more essential in our democracy than asking the government to correct its errors. These First Amendment protections restrain the State under the due process clause of the Fourteenth Amendment.

Petitioner's effort to obtain an opportunity to demonstrate to Dr. Natarajan, a State official, that the specimen displayed hemorrhage-bearing tissue throughout the time when Petitioner saw it constitutes a prime illustration of petition for redress. So, too, the ambit of protected speech easily extends to Petitioner's spontaneous response that if Dr. Natarajan and Dr. Baden, as professionals, concluded that Petitioner was right, then the criticisms of Dr. Natarajan would naturally cease.

More particularly, the Appellate Division implicitly conceded an ambiguity in the punished speech, which it held "***could*** lead the jury to believe that he attempted to tamper with Natarajan" (dsa 42, emphasis added). This same speech could also be understood to mean that following Dr. Speth's exoneration of false accusations, the motivation for criticizing Dr. Natarajan would abate. Absent some independent corroboration of a criminal intent, Petitioner's ambiguous speech cannot constitutionally be punished. ***Speiser v. Randall***, 357 U.S. 513, 526 (1958) (Brennan, *J.*) (courts must protect "speech [which] falls close to the line separating the lawful and the unlawful"); ***United States v. Spock***, 416 F.2d 165, 173 (1st Cir. 1969) (ambiguous utterances are protected unless they are linked to unambiguous statements, unlawful action, or subsequent acts "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated"). *Cf.* ***DeFalco v. Anderson***, 209 N.J. Super.

99, 107 (App. Div. 1986) (First Amendment precludes libel by innuendo). Absolutely nothing in the evidential record clarifies the ambiguity in Petitioner's words. ***Speiser*** and ***DeFalco*** therefore require disallowing the jury's uneducated guess.

Furthermore, ***Milkovich v. Lorain J. Co.***, 497 U.S. 1, 17 (1990), and ***Turf Lawnmower Repair, Inc. v. Bergen Record Corp.***, 139 N.J. 392, 403 (1995), both require of reviewing courts an "'independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Any independent examination would have found that the First Amendment protects the speech for which Petitioner is being branded a criminal. The courts below, however, eschewed undertaking the required ***Milkovich*** analysis.

* * *

3. THE LOWER COURTS FAILED TO ADHERE TO FREE SPEECH HOLDINGS OF THIS COURT AND THE UNITED STATES SUPREME COURT

Free speech holds a special place in our constitutional democracy. Under the First Amendment, the State cannot impose "censorship or punishment" on pure speech unless the speech "is shown likely to produce a clear and present danger of a serious substantive evil," ***Terminiello v. Chicago***, 337 U.S. 1, 4 (1949); or the speech is "inciting or producing imminent lawless action," ***Brandenburg v. Ohio***, 395 U.S. 444, 447 (1969); or the speech is obscene or constitutes so-called "fighting words." ***Cohen v. California***, 403 U.S. 15, 20 (1971). ***See also DeJonge, supra*** (requiring an imminent danger to some legitimate state interest). Petitioner's words to Dr.

Baden do not fit into any of these exhaustive exceptions to the constitutional right of free speech.

To guard against any exception swallowing the rule, ambiguous speech cannot constitutionally be punished in the absence of clear and convincing proofs which remove the ambiguity. ***Speiser***, ***Spock***, ***DeFalco***, all ***supra***. Petitioner's speech was ambiguous and the record is totally devoid of any proofs which could clarify that ambiguity. The lower courts, by refusing to conduct the required ***Milkovich-Turf Lawnmower*** independent examination of the whole record for clear and convincing evidence of wrongful intent, wrongly allowed an uninstructed jury to resolve ambiguous speech by guesswork or confusion, or as a compromise verdict.

INDICTMENT
October 5, 1995 (excerpt)

THIRD COUNT

And the Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Claus P. Speth between on or about the 8th day of April, 1994 in the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, while aware that an investigation and/or court proceedings were pending, did knowingly attempt to induce or otherwise cause Dr. Geetha Natarajan, a witness in the investigation and proceedings, to withhold testimony or physical evidence, contrary to the provisions of N.J.S.2C:28-5, a crime of the Third Degree, and against the peace of this State, the government and dignity of the same.